

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF THE (CITY-LABOR)
PRACTICE #27-1977.)

KALISPELL POLICE PROTECTIVE
ASSOCIATION,)

Complainant,)

FINAL ORDER

vs.)

CITY OF KALISPELL, MONTANA,)

Defendant.)

No party to the above captioned matter has filed exceptions to the
Findings of Fact, Conclusions of Law, and Recommended Order within the time
limits established by the rules and regulations of the Board of Personnel
Appeals.

THEREFORE, the Board adopts the Recommended Order in the above captioned
matter as the Final Order of the Board.

DATED this 4th day of October, 1978.

BOARD OF PERSONNEL APPEALS


Brent Cronley, Chairman

CERTIFICATE OF MAILING

I, Robert R. Jensen, do hereby certify and state that on the 4th
day of October, 1978, a true and correct copy of the above captioned FINAL
ORDER was mailed to the following:

Barbert F. Donahue
City Attorney
City Hall
Kalispell, MT 59901

H. James Olson
Attorney at Law
P.O. Box 1057
Kalispell, MT 59901


Robert R. Jensen

BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR
PRACTICE #27-77,

KALISPELL POLICE PROTECTIVE
ASSOCIATION,

Complainant,

VS.

CITY OF KALISPELL, MONTANA,

Defendant.

FINDINGS OF FACT

CONCLUSIONS OF LAW

AND

RECOMMENDED ORDER

* * * * *

On August 22, 1977, the Complainant, in the above captioned matter, filed an Unfair Labor Practice Charge with the Board of Personnel Appeals. The Complainant contended the Defendant violated certain sections of the Collective Bargaining Act for Public Employees. The specific charges were as follows:

- I. The Defendant has refused and is still refusing to furnish information requested by the Complainant's exclusive representative on or about May 24, 1977. Said information requested concerned wages and other financial matters of the City's employees. By the above acts and conduct, the public employer has violated Section 59-1605 (1)(e) of the Act.
- II. The Defendant has refused since June 14, 1977, to meet at reasonable times, dates and places, upon request by the exclusive representative. When meetings are requested, the Defendant's agent states that he is unable to locate their bargaining representative. By the above acts and conduct, the Defendant has further violated Section 59-1605 (1)(e) and (3) of the Act.
- III. The Defendant has interfered with, restrained, and coerced individual Association members since June 1977 when collective bargaining commenced by attempting to compel individual Association members to work different hours and shift assignments than prescribed by the collective bargaining agreements. When the Defendant's individual offer was refused, the Defendant then withdrew and modified their employment conditions. By the above acts and conduct, the Defendant has violated Section 59-1605 (1)(a)(c)(e) and (3) of the Act.
- IV. The Defendant, on August 5, 1977, threatened to place Association members under personal surveillance or, fire them outright for

1 alleged concerted union activities. By the
2 above acts and conduct, the Defendant has
violated Section 59-1605 (1) (a) of the Act.

3 V. The Defendant, on August 8, 1977, required
4 the exclusive representative to attend a
5 meeting in the Defendant's office and there-
6 after attempted to require the exclusive
7 representative to disclose how each indivi-
8 dual Association member had voted in a secret
9 ballot election regarding their wage offer.
10 By the above acts and conduct, the Defendant
11 has violated Section 59-1605 (1)(a) and (c)
12 of the Act.

13 VI. The Defendant, in an open City Council meet-
14 ing conducted at 8:30 p.m., August 8, 1977,
15 made a full and final offer regarding wages,
16 however, refused to consider the non-economics
17 item proposed by the Complainant. Thereafter,
18 the Defendant stated there would be no need
19 to meet and confer and that the Complainant
20 could do whatever they desired to do about
21 the matter. By the above acts and conduct,
22 the Defendant has violated Section 59-1605
23 (1)(e) and (3) of the Act.

24 On August 23, 1977, the Board of Personnel Appeals served
25 Mayor Norma E. Happ with the Unfair Labor Practice Charge.

26 On September 1, 1977, the Board of Personnel Appeals re-
27 ceived an Answer and Motion to Dismiss from the Defendant on the
28 grounds that Complaint, as filed, does not state a cause upon
29 which relief can be granted.

30 On September 16, 1977, the Board of Personnel Appeals denied
31 Defendant's Motion to Dismiss and issued Notice of Hearing.

32 On September 22, 1977, the Board of Personnel Appeals re-
ceived Application for Definite and Detailed Statement from the
Defendant.

On September 30, 1977, the Board of Personnel Appeals Ordered
Complainant to make More Definite Statement and Ordered Defendant
to Answer said More Definite Statement.

On October 3, 1977, the Board of Personnel Appeals received
More Definite Statement from the Complainant.

On October 12, 1977, the Board of Personnel Appeals received
Defendant's Amended Answer in which Defendant admits that Com-

1 plaintiff requested a copy of the payroll of the City Fire Department
2 employees, but denies that Complainant offered to excise the
3 names appearing thereon (reference to charge I). Defendant
4 denies the allegations in Complainant's charges II, III, IV, V
5 and VI.

6 A formal hearing in this matter was held October 19, 1977,
7 in the Council Chambers, City Hall, Kalispell, Montana, before
8 Stan Gerke, Hearing Examiner. The formal hearing was held under
9 authority of Section 59-1607 R.C.M. 1947 and as provided for by
10 the Administrative Procedure Act (Title 62, Chapter 42, R.C.M.
11 1947).

12 On November 21, 1977, the Complainant in this matter filed a
13 second Unfair Labor Practice Charge with the Board of Personnel
14 Appeals alleging the Defendant has, and is continuing to violate
15 the Public Employees' Collective Bargaining Act by refusing to
16 bargain collectively in good faith. The specific charges were as
17 follows:

18 VII. The Defendant has failed to bargain in good
19 faith, violating Section 59-1605 (1)(e), by
20 not moving from the \$45 offer.

21 VIII. The Defendant has failed to bargain in good
22 faith, violating Sections 59-1605 (1)(a) and
23 59-1605 (1)(e) by re-opening a closed negotiated
24 item.

25 On November 22, 1977, the Board served Mayor E. Happ with
26 the Unfair Labor Practice Charge, then captioned ULP #35-77.

27 On December 5, 1977, the Defendant filed Motion to Dismiss
28 and alternate Motion for Consolidation with the Board of Personnel
29 Appeals.

30 The Board of Personnel Appeals, on December 15, 1977, by
31 Order, denied Defendant's Motion to Dismiss and granted Motion
32 for Consolidation, thus consolidating ULP #35-77 with ULP #27-77.

A formal hearing was held April 12, 1978, in the Council
Chambers, City Hall, Kalispell, Montana, before Stan Gerke,
Hearing Examiner, which addressed the specific charges VII and

VIII. The hearing was held under authority of Section 59-1607 R.C.M. 1947 and as provided for by the Administrative Procedure Act (Title 82, Chapter 42, R.C.M. 1947).

At the April 12, 1978, hearing the Parties in this matter made two stipulations, below, for purposes of addressing charges VII and VIII.

1. Time period in question - October 19, 1977, to November 21, 1977.
2. That the City of Kalispell had, prior to August 9, 1977, offered the KPPA [Kalispell Police Protective Association] a forty-five dollar [\$45] per month per employee salary raise for the fiscal year 1977-78, and had not changed its position prior to and including November 21, 1977, relative to wages.

Post-hearing briefs were requested and received by Hearing Examiner in this matter. The briefs were duly reviewed and considered.

Little case law exists relative to the Montana Collective Bargaining Act for Public Employees. However, since the Montana Act is clearly modeled after the National Labor Relations Act, we can look at decisions of the National Labor Relations Board for guidance. Case law cited appearing herein are of that nature.

After examining all testimony and evidence and after having reviewed the Parties' briefs in this matter I make the following FINDINGS OF FACT:

FINDINGS OF FACT

GENERAL

1. The City of Kalispell, Montana, Defendant, has recognized the Kalispell Police Protective Association (KPPA), Complainant, as the exclusive representative for police officers employed by the Defendant.
2. On July 1, 1976, the City and the KPPA entered into a written agreement (Defendant's Exhibit No. 1).

I.

The Defendant has refused and is still refusing to furnish information requested by the Complainant's exclusive representative on or about May 24, 1977. Said information requested concerned wages and other financial matters of the City's employees. By the above acts and conduct, the public employer has violated Section 59-1605 (1)(a) of the Act.

3. Mr. Ron Fredenberg, a representative of the KPPA and member of the KPPA's Negotiating Committee, testified that he requested the City to provide certain information relative to overtime wages earned by firemen in connection with the operation of the City Ambulance. Mr. Fredenberg maintained the requested information was "germane" to the current contract negotiations so "...we could make an intelligent request from the City on wages, based on what possibly was being paid to other City employees." Mr. Dale Gifford, a representative of the KPPA and member of the KPPA's Negotiating Committee, testified he also requested the information which specifically was the individual monthly overtime wages earned by firemen relating to the City Ambulance operation. Both Mr. Fredenberg and Mr. Gifford testified they had not received the requested information. Mr. Gary Nystall, Director of Finance for the City, in his testimony, confirmed the information was requested and that the specific information was not delivered to either Mr. Fredenberg or Mr. Gifford. Mr. Nystall did describe the information that was delivered to the KPPA,

" We [City] provided them with the salary ordinance adopted by the City Council in August of 1976 which set out the hourly or the monthly rate of pay for all employees of the City of Kalispell from which they [KPPA] could determine the hourly pay and thus the overtime rate of the firemen who were called back. We provided them with the, a copy of one of the clerk's reports, I can't tell you which month, which the clerk's report sets out the revenues derived by the ambulance fund from charges for services as well as the expenditures made from that fund and the expenditures are broken down between two salary categories, the clerical salary category and then the overtime salary category so

1 that we felt it was reasonable for them to
2 determine from that information what the,
3 let's say the average additional monthly
4 income a fireman could be earning for the
5 ambulance call back."

6 Mr. Nystall further explains some of the mechanics necessary to
7 figure the firemen's wage overtime amounts. Under examination
8 and in answer to the question, "So when you get right down to it,
9 the Policemen [KPPA] got the information they were after?", Mr.
10 Nystall answered, "I would say reasonably yes."

11 The NLRB has long held that it is the duty of the employer
12 to furnish the union, upon request, sufficient information to
13 enable the union to understand and intelligently discuss the
14 issues raised in bargaining. (S.L. Allen and Co., Inc. -vs-
15 Federal Labor Union, Local No. 16526, 1 NLRB 714 (1936)). Com-
16 plaintant cites Boston Herald-Traveler Corp. v. NLRB (CA 1955)
17 223 F.2d 58, 36 LARM 2220 (1955), as authoritative when dis-
18 cussing the question of furnishing information. In the Boston-
19 Herald-Traveler Corp. case, supra, subject matter dealt with the
20 furnishing of linked wage data of bargaining unit employees. In
21 this instant case the KPPA has requested wage data of employees
22 not in the bargaining unit, however, the issue of non-unit em-
23 ployees was not at issue.

24 In this instant case, the City has provided the basic infor-
25 mation from which, by means of mathematical calculations, the
26 KPPA could derive further specific detailed information. In
27 reference to S.L. Allen and Co., Inc., supra, the City, in instant
28 case, has marginally fulfilled the duty to furnish information.

29 Defendant argues that the specific information was not
30 provided because the City Ambulance is a City "enterprise opera-
31 tion", is not tax supported, and the income from the City Ambu-
32 lance is not a regular general fund source of revenue and has no
33 bearing on the ability of the City to grant further wage increases
34 to KPPA members. Much testimony was given by Mr. Nystall explain-

ing how the Ambulance Fund is operated not unlike any other City fund or operation. Mr. Nystall explains, "I would say it [City Ambulance] is an enterprise operation of the City of Kalispell," and further testified the City Ambulance was a City-owned service. Mr. Gifford and Mr. Leonard York, professional negotiator hired by the City, both testified the feasibility of KPPA members participating in the ambulance operation had been discussed during negotiations. Because the Ambulance Fund, in essence, is City owned and operated and participation of KPPA members in the ambulance operation was, at the least, discussed in the bargaining arena, I dismiss Defendant's arguments.

II.

The Defendant has refused since June 14, 1977, to meet at reasonable times, dates and places, upon request by the exclusive representative. When meetings are requested, the Defendant's agent states that he is unable to locate their bargaining representative. By the above acts and conduct, the Defendant has further violated Section 59-1605 (1)(a) and (3) of the Act.

Evidence presented revealed the parties initiated negotiations sometime in May of 1977. Three "formal" meetings were held in June, 1977, with Mr. Grainger, Mr. York and Mr. Gifford attending. These meetings occurred on June 3, 13 and 14, 1977, and each meeting lasted two hours or less. The term "formal" was used by Mr. Grainger to describe these three meetings because he felt meetings were "formal" when Mr. York was present. On the conclusion of the last "formal" meeting, the KPPA had before them a City monthly wage offer of 5% (then figured at \$46.46). The testimony differs at this point. Mr. Gifford and Mr. Fredenberg both testified that Mr. Grainger was to supply additional financial information, contact Mr. York, and arrange another "formal" meeting. Mr. Grainger testified he had supplied the information and,

1 "...I do not think there was a guarantee made
2 because at that time Mr. Gifford refused our
3 offer and when we [City] tried to renegotiate
4 on the \$45 [recalculations changed \$46.46 to
5 \$45.00] Mr. Gifford and Mr. Fredenberg refused
6 that offer, so as far as you trying to say
7 that I or they tried to say that I guaranteed
8 them a meeting with Mr. York, that guarantee
9 was not there, Mr. Olson, no sir, it was
10 not."

11 Mr. York's office is in Portland, Oregon, and obviously he
12 must travel to Kalispell to attend negotiating services. Mr.
13 Grainger testified that Mr. York was hard to contact although
14 conflicting testimony by Mr. York revealed he utilized a tele-
15 phone answering service, but more interestingly, Mr. York travels
16 to Kalispell approximately every two weeks. Mr. Grainger testi-
17 fied that Mr. York's services were terminated after the last
18 "formal" meeting,

19 "... Mr. York was subsequently dismissed by
20 the City Council because of these same prob-
21 lems that Mr. Gifford was bringing up as if
22 he was hard to get a hold of because he does
23 not just negotiate for us, so consequently we
24 dismissed him and then from then on, formal
25 or informal, I negotiated with them [KPPA]
26 back to the City Council so that everybody
27 knew where we were standing at that time."

28 Mr. Fredenberg testified,

29 "...my definition of a formal meeting would
30 be when, whether it be Mr. Grainger or Mr.
31 York, would come up and say, okay, we have
32 had another meeting, we are hereby authorized
33 to make what I would consider a formal offer
34 to which we would have to call a vote of our
35 Association members and whether acceptance or
36 rejection would be, to me that would be a
37 formal meeting. To me it wouldn't matter who
38 was there as long as there was a formal offer
39 and a formal either acceptance to turn down
40 an offer type situation."

41 Mr. Grainger testified it is not necessary that all members of
42 his negotiating Committee be present in order to negotiate,
43 however Mr. Grainger preferred that Mr. York be present. In
44 answer to a question if it were completely necessary that Mr.
45 York be present, Mr. Grainger replied,

46 "Well, Mr. York and I discussed that and when
47 we, you know, when you arrived at a figure

1 and there is nothing more in the budget, Mr.
2 York's a busy gentleman as I stated, that is,
3 we just never really got back together, I
4 guess. I do like to have him there because
5 as I find out now I guess it's necessary to
6 have a professional."

7 I find Mr. York's presence was not a necessary ingredient in
8 order for the City's negotiating Committee to function.

9 As stated earlier, the parties had three "formal" meetings
10 in June of 1977. No further "formal" meetings were held from
11 June 14, 1977, to date of hearing on this matter (October 19,
12 1977), however several "informal" meetings were held between the
13 parties with Mr. Grainger representing the City and with Mr.
14 Gifford and/or Mr. Fredenberg representing the KPPA. Mr. Grainger
15 Mr. Gifford and Mr. Fredenberg all testified these "informal"
16 meetings did occur and the number of meetings held was approxi-
17 mated between eight and ten. Both Mr. Gifford and Mr. Fredenberg
18 testified they felt the "informal" meetings were just that, just
19 informal. They described the "informal" meetings as visits with
20 Mr. Grainger to discuss negotiations, not to negotiate. Both Mr.
21 Gifford and Mr. Fredenberg testified they requested Mr. Grainger
22 to contact Mr. York and schedule a "formal" meeting to actually
23 negotiate. As discussed earlier, however, Mr. York's presence
24 was not necessary for the parties to negotiate. I believe an
25 examination of certain portions of the record will be helpful in
26 understanding the dilemma:

27 Grainger: ...yes, I did have several [informal] meetings
28 with them [Mr. Gifford and/or Mr. Gredenberg] and at that
29 time we disclosed \$45 was the maximum that we could pay....

30 Oleson: As I understand it, there wasn't really room to
31 negotiate, it was either \$45 or nothing, is this correct?

32 Grainger: Well, unless they wanted to take less than \$45.

Oleson: So the only negotiation that the city offered the
KPPA...

1 Grainger: Was \$45 a month.

2 Oleson: You either take \$45 a month or less?

3 Grainger: No, no, that is hard core, Mr. Oleson, we settled
4 with all the other employees at \$45 a month and that is all
5 we could pay them because we took revenue sharing and that
6 was not a hard core you either take it or else, it was that
7 is what we have to pay.

8 Oleson: I guess I am kind of lost here, I thought you
9 testified that you said it was either \$45 or less, is this
10 correct?

11 Grainger: That's all the money we have, right.

12 Oleson: So then you are not saying that it is hard core,
13 that this isn't really what we said,

14 Grainger: No, what I am saying is that we didn't just say
15 either you take it or, that's not how it was delivered, I
16 have never delivered that to these people yet.

17 Oleson: Right, but in the testimony here you said that they
18 refused to negotiate further, that you had only offered them
19 \$45 a month period.

20 Grainger: That's all we had.

21 Oleson: There was no possibility at all of any negotiations
22 for anything else?

23 Grainger: What else are you going to negotiate if you have
24 only got \$45.

25 * * * * *

26 Oleson: Now getting to these informal meetings, do you
27 recall and I am not trying to pin you down to times and
28 places here, but approximately how many were had, at whose
29 insistence they were had, or how they came about?

30 Grainger: Some of them they called me, I can recall one day
31 Mr. Gifford called and he come down and we talked on a
32 Sunday afternoon, they had both Mr. Fredenberg and Mr.

1 Gifford been in my office; we had went for coffee, we had
2 met in city hall, we had met in the police station and all
3 the discussion was back to the wage thing and \$45 was all we
4 could expend and as far as, we always, I always brought it
5 back to the council of where we were sitting.

6 Oleson: I am still a little I guess not clear in my mind,
7 during any of these informal meetings did they ever request
8 a formal meeting with yourself and Mr. York relative to wage
9 negotiations that you recall, now I am not trying to...

10 Grainger: I would assume we probably discussed it yes.

11 Oleson: You don't recall specifically then requesting any
12 particular formal meetings?

13 Grainger: Yes, we did have, because at that time we were
14 with \$45 a month and that is as far as we could go.

15 Oleson: Is that still the position of the city today that
16 KPPA accept \$45, no negotiations other than if you want less
17 than \$45?

18 Grainger: If we had more money maybe I would have a little
19 bit more leniency but we do not have the money.

20 Oleson: I guess I am not making my questions clear enough,
21 that's your sole authority which is what I am trying to find
22 out is that you have the authority only to say either \$45 or
23 less than \$45.

24 Grainger: You're rephrasing your question wrong Mr. Oleson,
25 you are asking me one thing and trying to get another answer
26 and you are not going to get that out of me, the responsi-
27 bility is 45 bucks because that is all we have in the money,
28 the budget, now if there were more money in the budget the
29 authority would be higher, so you are asking one question
30 and searching for another answer.

31 Oleson: No, I am not doing that, I am asking what was your
32 authority.

1 Grainger: My authority is what the budget has and the
2 budget has \$45 so that is your answer.

3 Oleson: Okay, so your main authority was...

4 Grainger: You got that answer.

5 Oleson: The city would offer \$45 or less

6 Grainger: I have answered that.

7 Oleson: Fine, and there is no room for negotiating other
8 than that...

9 Grainger: I have already answered that, no
10 there is not.

11 Also, in his testimony, Mr. Grainger stated, in several instances,
12 he was willing to meet with the KPPA basically at any time.

13 I believe Mr. Grainger is sincere in his willingness to meet
14 with the KPPA and Mr. Grainger is the authorized representative
15 for the City for negotiations. However, as the above quoted
16 record clearly indicates, Mr. Grainger was extremely limited as
17 to discussions on wage increases. The record indicates Mr.
18 Grainger felt it would not be fruitful to meet with the KPPA in a
19 "formal" meeting unless the KPPA was willing to accept the \$45
20 offer or, at least, discuss the \$45 offer. Mr. Grainger had
21 nothing more to offer on wages, but he did meet with the KPPA in
22 an "informal" setting.

23 I find that an authorized representative of the City (Mr.
24 Grainger) was available and willing to meet with representatives
25 of the KPPA.

26
27
28 III.

29 The Defendant has interfered with, restrained,
30 and coerced individual Association members
31 since June 1977 when collective bargaining
32 commenced by attempting to compel individual
Association members to work different hours
and shift assignments than prescribed by the
collective bargaining agreements. When the
Defendant's individual offer was refused, the

1 Defendant then withdrew and modified their
2 employment conditions. By the above acts and
3 conduct, the Defendant has violated Section
4 59-1605 (1)(a)(c)(e) and (3) of the Act.

5 5. The written agreement between the parties (Defendant's
6 Exhibit No. 1), contains provisions for work schedules:

7 ARTICLE V
8 HOURS OF WORK AND OVERTIME

9 SECTION 1. STARTING TIMES AND WORK SCHEDULES:
10 The following starting times and work schedules,
11 as determined by the Chief of Police, shall be as
12 follows:

13 Six (6) days on and three (3) days off, for a
14 minimum of an eight (8) hour shift each day except
15 in the event of civil disorder or national disaster,
16 or unusual occurrences.

17 In the event of any proposed major change in
18 work schedules, advance notice of such proposed
19 change and an opportunity for prior consultation
20 and mutual agreement shall be afforded to the
21 Association. Shift change shall not be made for
22 disciplinary reasons.

23 Testimony given documented that three police officers,
24 Patrolman Dyer, Sgt. Stotts and Lt. DuPuy, were requested by
25 Police Chief LeRoy McDowell to change their work schedules from
26 the 6-3 to a 5-2 schedule while working in the Detective Division.
27 Chief McDowell explained the 5-2 schedule was more compatible
28 with investigation work. Mr. Gifford testified the change of
29 work schedules which is an apparent violation of the written
30 agreement was reported to him by the officers affected. No
31 formal grievance was filed on the matter, however, the alleged
32 contract violation was verbally reported to Mr. Grainger and
33 Chief McDowell by Mr. Gifford. When Mr. Donahue asked why the
34 KPPA did not file a formal grievance, since the contract contains
35 a definite grievance procedure, Mr. Gifford answered,

36 "Because over the two years that we have had
37 this contract, we have attempted to work out
38 our problems with the Chief [Police Chief
39 McDowell] and whoever he talks to, the Mayor,
40 without going through the convocation or rigors
41 of grievances and this worked fairly
42 well; that's why we didn't file a grievance."

43 Mr. Gifford testified to a meeting held in the Mayor's where an
44 agreement was reached;

1 "The final settlement, I guess you could say,
2 was in the Mayor's office and I can't tell
3 you what day or hardly even the month, it was
4 this summer. We sat down and worked out a
5 schedule that had an equal amount of days off
6 for the plainclothesmen even though their
7 shift wasn't 5-3, it was such that they would
8 work 5-2 two weeks and 5-4, anyway over a
9 year it equaled out that they had the same
10 amount of days off as we [uniformed officers],
11 did...."

12 Mayor Happ and Chief McDowell also testified as to the agreement.

13 Complainant contends the City of Kalispell has failed to
14 bargain in good faith by (1) Negotiating directly with employees,
15 or (2) Unilaterally changing wages or other employment conditions
16 that are mandatory subjects for collective bargaining. Com-
17 plainant cites Medo Photo Supply Corp. v. NLRB, U.S. Sup. Ct.
18 1944, 14 LRRM 581, which states in part:

19 That it is a violation of the essential
20 principle of collective bargaining and an
21 infringement of the Act for the employer to
22 disregard the bargaining representative by
23 negotiating with individual employees, whether
24 a majority or a minority, with respect to
25 wages, hours and working conditions was
26 recognized by this Court in [cites].

27 Medo Photo at page 4.

28 In the instant case, a representative of the KPPA, Mr.
29 Gifford, did, in fact, meet with the City to negotiate, if you
30 will, an alternative shift for the three affected officers. I
31 cannot find that the City either negotiated with individual
32 employees or changed the work shift unilaterally.

33 Complainant also contends the City of Kalispell failed to
34 bargain in good faith by unilaterally changing employment condi-
35 tions which may be mandatory subjects for collective bargaining
36 when Officer Dick Stotts was told by the City to discontinue the
37 practice of driving the police van home. The reason given for
38 such change in practice was that the City suspected Officer
39 Stotts of using the police van for private use. Officer Stotts
40 denied such private usage and testimony revealed no investigation
41 was performed on the City's allegation. The record does not

1 provide sufficient evidence on this matter giving the history of
2 the police van to determine if, in fact, it is a mandatory sub-
3 ject for collective bargaining. Therefore, I cannot make find-
4 ings on this matter.

5 Two other matters were discussed during the Formal Hearing
6 and addressed in the Defendant's post-hearing proposed Findings
7 of Fact. The first item dealt with the non-payment of state law
8 established increment pay for police officers. Testimony re-
9 vealed the City, for the months of July and August, 1977, did not
10 include the \$7.50 increment pay due July 1, in police officers
11 paychecks. The undisputed testimony of Mr. Grainger explained
12 the City was anticipating a completely modified pay schedule
13 because of contract negotiations and it would be more convenient
14 to change the entire pay modifications at one time. Mr. Grainger
15 continued to explain because salary increases were settled, the
16 City paid the police officers their increments for the months in
17 question later in September of 1977. Mr. Fredenberg affirmed the
18 payments.

19 The second matter dealt with Mr. Fredenberg alleging the
20 City had not allowed him to attend a certain school (Intermediate
21 School held in Bozeman, Montana) after such school was promised
22 to him. Mr. Fredenberg inferred the school was denied him because
23 of his involvement with the KPPA. Following is dialogue between
24 Mr. Donahue and Mr. Fredenberg:

25
26 Donahue: And you are stating now that you were, that Chief
27 McDowell did not send you to that school as a matter of bias
28 and prejudice, is that what you are saying?

29 Fredenberg: I said that I could only speculate that.

30 Donahue: So it is merely your speculation, you don't have
31 any knowledge or don't have any other reason to believe
32 that...

1 Fredenberg: No sir, I do not.

2 Donahue: You did, it is a matter of fact that you did go to
3 another school in June, is it not, didn't you go to a traffic
4 school in June?

5 Fredenberg: Yes, I did.

6 Donahue: And how long did that school last?

7 Fredenberg: One week.

8 Donahue: Where was it held?

9 Fredenberg: Great Falls.

10 Donahue: Are you aware of the policy of your department
11 that the Chief of Police tries to give as much cross train-
12 ing as possible to members of the department?

13 Fredenberg: I...

14 Donahue: Are you aware or aren't you aware?

15 Fredenberg: No, I am not aware.

16
17 Chief McDowell, in his testimony, explained the policy of
18 the Police Department concerning training schools; Mayor Happ
19 affirmed the policy as it was by her directive. The policy is to
20 allow all police officers to attend training schools on a rota-
21 tion basis so each police officer can participate in the schools.
22 Chief McDowell also denied that Mr. Fredenberg was "promised" any
23 particular school. I cannot find the above referenced subject
24 matter could be construed to substantiate an unfair labor prac-
25 tice by the City as charged by the KPPA.

26 IV.

27 The Defendant, on August 5, 1977, threatened
28 to place Association members under personal
29 surveillance or, fire them outright for
30 alleged concerted union activities. By the
31 above acts and conduct, the Defendant has
32 violated Section 59-1605 (1)(a) of the Act.

33 6. Mr. Fredenberg testified to a meeting of the KPPA at which a
34 slow-down was discussed as a possible tactic to enhance their
35 bargaining position. Mr. Fredenberg explained the meeting was

1 called to "discuss these facets of the slow-down." However,
2 insufficient members of the KPPA attended the meeting to form a
3 quorum, and no decision was made concerning a slow-down according
4 to Mr. Fredenberg. Mr. Gifford and Mr. Klingler also testified
5 to the meeting held and also denied that any organized concerted
6 activity was implemented upon by the KPPA.

7 The KPPA charged that the City interfered with the protected
8 right of the KPPA to engage in a concerted activity. In this
9 case, there was not a concerted activity (slow-down) implemented
10 by the KPPA. Therefore, I cannot find that the City committed
11 an unfair labor practice.

12 V.

13 The Defendant, on August 8, 1977, required
14 the exclusive representative to attend a
15 meeting in the Defendant's office and there-
16 after attempted to require the exclusive
17 representative to disclose how each indi-
vidual association member had voted in a
secret ballot election regarding their wage
offer. By the above acts and conduct, the
Defendant has violated Section 59-1605 (1)(a)
and (c) of the Act.

18 On August 8, 1977, Mr. Gifford was requested to attend a
19 meeting in the Mayor's office at approximately 3:00 o'clock in
20 the afternoon. At that meeting, Mr. Gifford was asked the out-
21 come of a vote taken earlier by the KPPA on the question of
22 either accepting or rejecting the City's \$45 wage offer. Mr.
23 Gifford reported, "The results were 17 against accepting and 1
24 for accepting." Mayor Happ and Mr. Grainger both testified they
25 were amused with the voting report because Mr. Gifford had said
26 it was conducted by "secret ballot", yet the vote was taken by
27 telephone. Mayor Happ explained she asked Mr. Gifford which
28 employee voted for acceptance of the \$45 wage offer in a "joking
29 manner" and did not expect Mr. Gifford to reveal how anyone
30 voted. Mayor Happ testified she did not make any further effort
31 to elicit additional voting information from Mr. Gifford. Mr.
32 Gifford affirmed that the Mayor did not attempt coercive effort

1 or any other kind of force to elicit any confidential vote results.
2 I find that Mayor Happ did not attempt to require Mr. Gifford to
3 disclose how each individual Association member voted in a secret
4 ballot election.

5 VI.

6 The Defendant, in an open City Council meeting
7 conducted at 8:30 p.m., August 8, 1977, made
8 a full and final offer regarding wages,
9 however, refused to consider the non-
10 economics item proposed by the Complainant.
11 Thereafter, the Defendant stated there would
be no need to meet and confer and that the
Complainant could do whatever they desired to
do about the matter. By the above acts and
conduct, the Defendant has violated Section
59-1605 (1)(e) and (3) of the Act.

12 8. At a City Council meeting held on August 8, 1977, the various
13 city departments represented by bargaining agents responded to
14 the \$45 per month per employee wage increase offered by the City.
15 As reported at the City Council meeting, according to Mr. Gifford,
16 all City employees accepted the \$45 offer except for the Police
17 Department and the Street Department (who had not taken a vote as
18 of August 8, 1977).

19 Complainant charges the City refused to consider the non-
20 economics item proposed by the Complainant. Mr. Gifford testi-
21 fied the non-economics item was not "mentioned" at the August 8,
22 City Council meeting, "...got up on their heels and marched out
23 and that was the last we saw of them", after the \$45 offer was
24 made. Obviously, no opportunity remained to discuss or negotiate
25 any further matters on August 8th. I do not find that the Defen-
26 dant refused to consider this non-economics item, however, I do
27 find the Defendant was unable to discuss the item in question.

28 The Complainant further charges the Defendant stated that
29 there was no further need to meet and confer. In reference to
30 Finding of Fact #4, above, Mr. Grainger was and would be avail-
31 able to meet with representatives of the KPPA. Mr. Gifford also
32 testified he had met with Mr. Grainger after the August 8th City

1 Council meeting. If, in fact, the Defendant did expressly state
2 there would be no further need to meet and confer, that statement
3 was not adhered to. I find that the City did meet and confer
4 with the KPPA before and after the City Council meeting of
5 August 8, 1977.

6 VII.

7 The Defendant has failed to bargain in good
8 faith, violating Section 59-1605 (1)(e), by
9 not moving from the \$45 wage offer.

9 9. As mentioned above, the Parties to this matter made two
10 stipulations in considerations of changes VII and VIII. The
11 Stipulations, again, are as follows:

12 Time period in question - October 19, 1977 to
13 November 21, 1977.

14 -and-

15 That the City of Kalispell had, prior to
16 August 8, 1977, offered the KPPA a \$45 per
17 month per employee salary raise for the
18 fiscal year 1977-78 and had not changed its
19 position prior to and including November 21,
20 1977, relative to wages.

21 Further testimony given during the hearing revealed that by
22 letter of October 28, 1977, the KPPA made a formal offer of
23 settlement (Defendant's Exhibit A). The Parties met in bargain-
24 ing session on November 7, 1977, and by letter dated November 10,
25 1977, addressed to H. James Oleson, Mr. Donahue reported the
26 outcome of the November 7th bargaining session which, in short,
27 resulted in no settlement as attested to by Mr. Grainger.

28 During the hearing Complainant suggested the City could
29 initiate an emergency budget in order to raise their \$45 wage
30 offer. Both Mayor Hupp and Mr. Grainger testified that creating
31 an emergency budget would be unsound and irresponsible. Mr.
32 Grainger testified the City could only afford the \$45 after
33 examining the total budget.

34 Because of the limitations dictated by the stipulation
35 (above), I can only examine testimony relating to events between

1 October 19, 1977, and November 21, 1977. In that time frame and
2 referencing the second stipulation and testimony, I find that the
3 City offered \$45 per month per employee salary raise for fiscal
4 year 1977-78, which they felt was fair in light of the financial
5 condition of the City. I find that the City did not move from
6 the \$45 offer during the time frame dictated (also reference the
7 second stipulation). Not moving from a bargaining position, in
8 itself, is not an unfair labor practice as discussed in Wal-lite
9 Division of United States Gypsum Company vs. National Labor
10 Relations Board, 94 LRM 2129 (1973). In U.S. Gypsum Company,
11 the U.S. Court of Appeals, Eighth Circuit, found, at 2131:

12 Without substantial evidence that a negotiating
13 party's attitude is inconsistent with its
14 duty to seek an agreement, the mere fact that
15 it adamantly insists on a bargaining position
16 or has not budged from its position on most
17 issues cannot suffice to render it guilty of
18 a refusal to bargain in good faith. [cases
19 cited]

20 In the instant case and within the time frame dictated,
21 there is no evidence that the City expressed the desire not to
22 seek an agreement. The City did adamantly retain its position on
23 the \$45 offer.

24 VIII.

25 The Defendant has failed to bargain in good
26 faith, violating Sections 59-1605 (1)(a) and
27 59-1605 (1)(e) by re-opening a closed negotiated
28 item.

29 10. As per the written agreement between the Parties (Defendant's
30 Exhibit No. 1), aside from wages, each Party to the agreement may
31 open one non-economic item for the purpose of negotiations. The
32 KPPA's chosen non-economic item was "overtime and sick shift" as
33 explained in the October 28, 1977, letter (Defendant's Exhibit
34 A). Mr. Grainger and Mr. Gifford testified the City's one non-
35 economic item, the 6-3 work shift, was first introduced at the
36 November 7, 1977, bargaining session. Complainant contends the
37 6-3 work shift item was settled at earlier negotiating sessions

1 and Complainant further contends that the City designated its one
2 non-economic item too late for consideration.

3 Although some testimony given at this hearing related to
4 this matter, I cannot examine such evidence because of the time-
5 frame stipulation since the testimony given related to events
6 occurring before October 19, 1977. Any facts, other than those
7 indicated above, are unavailable to this hearing examiner and,
8 therefore, I cannot find on this matter.

9
10 CONCLUSIONS OF LAW

11 I. The Defendant has not violated Section 59-1605 (1)(e),
12 R.C.M. 1947.

13 II. The Defendant has not violated Sections 59-1605 (1)(e)
14 and (3) R.C.M. 1947.

15 III. The Defendant has not violated Section 59-1605 (1)(a),
16 (c), (e) and (3) R.C.M. 1947.

17 IV. The Defendant has not violated Section 59-1605 (1)(a)
18 R.C.M. 1947.

19 V. The Defendant has not violated Section 59-1605 (1)(a)
20 and (c) R.C.M. 1947.

21 VI. The Defendant has not violated Sections 59-1605 (1)(e)
22 and (3) R.C.M. 1947.

23 VII. The Defendant has not violated Section 59-1605 (1)(e)
24 R.C.M. 1947.

25 VIII. The Defendant has not violated Sections 59-1605 (1)(a)
26 and (c) R.C.M. 1947.

27 RECOMMENDED ORDER

28 All Unfair Labor Practice Charges in this matter are hereby
29 dismissed.

30 DATED this 15th day of August, 1978.

31 BOARD OF PERSONNEL APPEALS

32 By Stan Cerke
Stan Cerke
Hearing Examiner